

**New York State Department of Taxation and Finance**  
**Taxpayer Services Division**  
**Technical Services Bureau**

TSB-A-97(26)S  
Sales Tax

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S961206A

On December 6, 1996, a Petition for Advisory Opinion was received from Funk Lawn Spray, Inc., 330 Fillmore Avenue, Tonawanda, NY 14150.

The issues raised by Petitioner, Funk Lawn Spray, Inc., are:

1) Whether the purchase of mixer drums and assorted pumps, pulleys, chains and vehicle engine parts which are used to operate the mixer drums are exempt from sales and compensating use tax as production machinery and equipment.

2) Whether repairs to such items constitute exempt repairs to production machinery and equipment.

Petitioner presents the following facts.

Petitioner is in the business of providing lawn care services and fertilizer in conjunction with these services. Petitioner's sales are subject to sales tax. Petitioner provides fertilizer generally to customers of Petitioner receiving lawn care services. Petitioner's typical invoice breaks down the charges as follows:

**Charges :**

Fertilizer	\$ _____
Service Treatment	\$ _____
Subtotal	\$ _____
Sales Tax	\$ _____
Total	\$ _____

The fertilizers provided by Petitioner are manufactured from raw materials. Petitioner purchases the materials in bulk and mixes them in specifically designed mixer drums attached to the delivery trucks. The mixer drums use internal blades to process the materials to a uniform consistency.

Petitioner's "fertilizers" consist of approximately 40 different proprietary mixes which are used throughout the growing season. Each of the fertilizers is required to be identified and labeled on Petitioner's Department of Transportation shipping papers. The fertilizers provide a complete blend of Macro and Micro nutrients such as: nitrogen, phosphorous, potassium and Macro nutrients. This may be in the slow (time) release form or quick release form. Iron, sulfur and some 30 other items are used as Micro nutrients. Along with these mixes of fertilizers Petitioner produces selective "post"-emergent herbicide of some six varieties, and one selective "pre"-emergent herbicide. Insect controls with Pyrethroids and Oregano Phosphate mixtures, are also included.

Petitioner's fertilizers are proprietary. Each fertilizer has a specific composition which is listed with the Department of Environmental Conservation. Proper processing and mixing of the materials is essential to attain the biochemical reactions desired for proper use of the fertilizer. The materials are mixed at Petitioner's site of operation and again at the customer's site where the fertilizer is ultimately distributed. The cost of fertilizer represents an average of approximately 30% of Petitioner's charges but may vary depending on the type of fertilizer used.

Applicable Law and Regulations

Section 1101(b) (4) of the Tax Law states, in pertinent part:

Retail Sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property, or (B) for use by the purchaser in performing the services subject to tax under paragraphs (1), (2), (3), (5), (7) and (8) of subdivision (c) of section eleven hundred five where the property so sold becomes a physical component part of the property upon which the services are performed or where the property so sold is later actually transferred to the purchaser of the service in conjunction with the performance of the service subject to tax.

Section 1105 of the Tax Law states, in part:

Imposition of sales tax. -- . . . there is hereby imposed and there shall be paid a tax . . . upon:

\* \* \*

(c) The receipts from every sale, except for resale, of the following services:

\* \* \*

(5) Maintaining, servicing or repairing real property, property or land, . . .

Section 1105-B(b) of the Tax Law states, in part:

Notwithstanding any other provisions of this article, . . . the taxes imposed by subdivision (c) of section eleven hundred five on receipts from every sale of the services of installing, repairing, maintaining or servicing the tangible personal property described in paragraph twelve of subdivision (a) of section eleven hundred fifteen, including the parts with a useful life of one year or less, tools and supplies described in subdivision (a) of this

section, to the extent subject to such tax, . . . shall be exempt from the tax on sales imposed under subdivision (c) of section eleven hundred five on and after March first, nineteen hundred eighty-one.

Section 1115(a)(12) of the Tax Law provides an exemption from the sales tax with respect to the purchase of "machinery or equipment for use or consumption directly and predominantly in the production of tangible personal property, . . . for sale, by manufacturing, processing, . . . ."

Section 527.7 of the Sales and Use Tax Regulations states, in part:

Maintaining, servicing or repairing real property. (a) Definitions. (1) Maintaining, servicing and repairing are terms which are used to cover all activities that relate to keeping real property in a condition of fitness, . . . Among the services included are . . . services to the grounds, such as lawn services, . . . .

(b) Imposition. (1) The tax is imposed on receipts from every sale of the services of maintaining, servicing or repairing real property, whether inside or outside of a building.

\* \* \*

(3) When the service of maintaining, servicing or repairing real property is performed in conjunction with the transfer of title to tangible personal property, the price of the tangible personal property is also subject to tax.

Example 7: A landscaping company enters into a contract to mow a customer's lawn on a regular basis; re-seed in the spring and fall and fertilize as needed. The total charge to the customer for labor and materials is taxable as maintenance, and the tax paid by the company on materials used in performing the service which become part of the property serviced may be claimed as a credit or refund.

Opinion

Assuming arguendo that the operations performed by the mixer drums and assorted pumps, pulleys, chains and vehicle engine parts in question constitute the "production of tangible personal property," within the meaning and intent of Section 1115(a)(12) of the Tax Law, the exemption under Section 1115(a)(12) is nonetheless inapplicable in the present instance because the predominant use of the machine is not production of tangible personal property "for sale". This conclusion derives from the following considerations.

The service of lawn fertilization is one of the taxable services referred to above and is included within the category of "maintaining, servicing or repairing real property, property or land" in Section 1105(c)(5) of the Tax Law. When Petitioner purchases materials which are mixed to specifications to create the fertilizer, the sale of such materials to Petitioner is not subject to tax as a retail sale. The sale of materials to Petitioner is not a sale for resale, excluded under section 1101(b)(4)(i)(A), but is a sale of tangible personal property to be transferred in conjunction with a taxable service (i.e., lawn fertilization), excluded under section 1101(b)(4)(i)(B). The statute treats (1) sales of property and (2) transfers of property in conjunction with the performance of a taxable service as distinct categories.

For purposes of the Tax Law, where a lawn is "serviced, maintained or repaired" by having Petitioner fertilize or treat the lawn, the entire charge, including that portion representing the value of the fertilizer, is a charge for the rendition of the service and not for the sale of tangible personal property. It follows that Petitioner under these circumstances is not selling tangible personal property to its customers, but rather is performing a taxable service. See Godfroy's Service Station, Inc., Adv Op Comm T & F, August 19, 1982, TSB-A-82(28)S. Accordingly, the mixer drums and assorted pumps, pulleys, chains and vehicle engine parts in question are not used predominantly in the production of tangible personal property "for sale," within the meaning and intent of section 1115(a)(12) of the Tax Law. Therefore, sales and compensating use taxes are due on the purchase by Petitioner of the mixer drums and assorted pumps, pulleys, chains and vehicle engine parts. Moreover, since such items do not constitute production machinery or equipment, any repairs to such items are also subject to sales tax.

DATED: April 24, 1997

/s/  
John W. Bartlett  
Deputy Director  
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.